DEC 11
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-571

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Respondents

Brief of Indiana & Michigan Municipal Distributors Association In Opposition

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Brief of Indiana & Michigan Municipal Distributors Association In Opposition

Comes now the Indiana & Michigan Municipal Distributors Association (IMMDA), an *ad hoc* association of municipally owned electric distributors which are customers of Petitioner Indiana & Michigan Electric Company (I&M) and are, as a group, intervenors and participants in the subject proceedings in the Federal Power Commission and the United States Court of Appeals for the District of Columbia Circuit (CADC), and files this Brief, pursuant to Rule 24 of the Rules of this Court, in opposition to the Petition for Certiorari filed by Indiana & Michigan Electric Company.

OPINIONS BELOW

The main opinion of the Court of Appeals and the order and opinion granting the petitions for rehearing and modifying the main opinion, neither of which is as yet reported, are reproduced in the Appendix, at 16a and 1a, respectively, of the Petition for Certiorari filed by Indiana & Michigan Electric Company.

QUESTIONS PRESENTED

1. Where an electric utility has petitioned for review of a Federal Power Commission order denying its requested relief, does the Court of Appeals exceed its authority by correcting an inadvertent procedural error of the Commission in such manner as to provide the utility with the exact relief it sought before the Commission?

2. Where the Federal Power Commission has, by virtue of an inadvertent procedural error, failed to observe a thirty-day statutory time limit upon issuance of an order suspending an electric rate increase filed under the Federal Power Act and providing for the collection subject to refund of any rates ultimately found to be excessive, does the Court of Appeals have authority to remedy the Commission's error by providing for suspension and refund of excessive rates?

STATUTES INVOLVED

The statute involved in this case is the Federal Power Act, Subchapter II, 16 U.S.C. § 824.

COUNTER STATEMENT OF THE CASE

These proceedings began with the filing by Indiana and Michigan Electric Company (I&M) of an electric rate increase under Section 205(d) of the Federal

Power Act (16 USC § 824 d (d)). The filing was made on June 13, 1972 and specified an effective date of July 14, 1972.

The Commission, through its Secretary, wrote to I&M on July 3, 1972, informing it that Section 35.13 (b) (4) (i) of the Commission's Regulations, required certain cost statements to be filed at least sixty days before the proposed rates were to become effective, and that the earliest effective date consistent with that Regulation was August 13, 1972.

On July 18, 1972, I&M moved for an effective date of July 14, 1972, instead of August 13.

The Commission denied that motion, and on August 11, 1972 issued an order setting August 13 as the effective date of the increase and suspending the new rates for the five-month period permitted by Section 205 (e) of the Act (16 USC § 824 d (e)), and providing for collection of the new rates after January 13, 1973, subject to refund. The Commission found:

> "The proposed rates and charges, furthermore, have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. * * * It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in I&M's proposed Federal Power Commission Electric Tariff and the use thereof deferred as hereinafter provided." (Pet. for Cert., App. p. 36a)

From this order delaying the effectiveness of its new rates by thirty days, I&M petitioned for rehearing, requesting specifically that the Commission:

> "Issue a supplemental order modifying paragraph (G) of its August 11, 1972 Order in this proceeding, so as to provide that I&M's proposed rate schedules are suspended for five months beginning July 14, 1972, and their use deferred until December 14, 1974." (Pet. for Cert. p. 7a)

This was the *only* relief requested by I&M except for such "other and further relief as to the Commission appears appropriate."

Upon denial of its application for rehearing, I&M petitioned for review to the United States Court of Appeals for the District of Columbia Circuit where, *for the first time*, it sought to have its new rates made effective without suspension, and without obligation for the refund of any portion thereof ultimately found to be excessive and unlawful.

The Court of Appeals held that Section 35.13 (b)(4)(i) of the Commission's Regulations was invalid, and the Commission had no power to require the filing of the data required thereby, prior to I&M's filing of its proposed new rate schedules; that I&M therefore had the right to an effective date of July 14, for its new rates; and that the Commission suspension and refund Order of August 11, 1972 was therefore out of time. The Court, therefore, held that, pursuant to Section 205 (d) and (e) of the Federal Power Act, 16 USC § 824 d(d) and (e), the new rates became effective, without suspension or refund obligation, on July 14, 1972.

The Court recognized that this was an anomalous result; that I&M had only sought an order changing the effective date of the new rate by thirty days, from August 13 to July 14 (in either event subject to the usual five-month suspension); and that

> "I&M was not seeking a procedural gimmick which would have resulted, as has now occurred, in voiding the Commission's five-month suspension order." (Pet. for Cert., App., p. 26a)

On petition for rehearing by the Commisson and customer groups, the Court considered the facts that

> "Under our main opinion, then, I&M's customers would be forced to pay possibly excessive rates from 13 January, 1973 until the conclusion of the Commission's ongoing hearings without prospect of receiving refund of the excessive amounts paid * * * *"

and that

> ". . . the Commission explicitly found in its 11 August, 1972 order that I&M's filed rates may be unjust or unreasonable ***"

and that

> "I&M sought from the Commission no greater relief than our modified order now grants * * *"

and that

> "By modifying our original order in the manner set out above, we eliminate the potential for hardship to I&M's customers and we accord I&M precisely the relief it sought from the Commission." (Pet. for Cert., App. p. 6a-7a)

The Court held that, under the principles set forth in the Court's opinions in *Ford Motor Company* v.

NLRB, 305 US 364 (1939) and *United States* v. *Morgan*, 307 US 183 (1939), it had the power to

> "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements." (305 US at 373)

Accordingly, the Court adjusted its relief to provide that I&M should not collect retroactive rate increases from the effective date of its filing, 14 July, 1972 through 13 December, 1972, but that it could collect such increases for the period 14 December, 1972 through 13 January, 1973 (thus granting to I&M the thirty-day change which it had originally requested of the Commission); and the Court stated that the rates collected after 13 December, 1972 would be subject to refund to the extent that they exceeded just and reasonable rates, as determined in the administrative proceedings.

The Court held that its action on the petition for rehearing was designed to advance the policies and procedural safeguards of Section 205 of the Act, and that it was not an infringement upon the Commission's exclusive suspension power, because the commission had explicitly determined that suspension was appropriate, but failed to issue its suspension order in a timely fashion. (App. to Pet. for Cert. 8a, 10a)

ARGUMENT

The action of the Court of Appeals on rehearing was well within the review powers of that Court, was amply supported by judicial precedent and was the only possible action consistent with the intent and purpose of the Federal Power Act.

I&M's Petition for Certiorari completely ignores the Administrative Procedure Act, which governs the scope of review by the Courts of Appeals of the actions of administrative agencies. (5 USC Sec. 701-706)

Section 705 of the APA specifically confers upon the reviewing court the power to:

> ". . . issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

This grant of power is to be exercised "to the extent necessary to prevent irreparable injury" (id.). Furthermore, under Section 703 of the Act, where the special statutory review proceeding is inadequate there is provision for "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus . . ." (5 USC Section 703). These provisions of the Administrative Procedure Act make clear beyond question the equitable powers of the court of appeals in a proceeding for review of the action of an administrative agency.

A large portion of petitioner's Brief herein consists in its attempt to distinguish this case from *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364 (1939), on the ground that the reviewing court in that case was exercising equity powers under the review provisions of the National Labor Relations Act which it does not have under the Federal Power Act.

This whole argument becomes irrelevant when the provisions of the Administrative Procedure Act are examined. The above quoted provisions of that Act clearly contemplate the exercise of equitable powers by courts which are engaged in the review of administrative agencies. Therefore, if the review powers of the court of appeals under the Federal Power Act were inadequate to provide the necessary relief which was granted in this case, that power was amply provided by the Administrative Procedure Act.

It is clear, furthermore, that this Court did not restrict the principles of the *Ford Motor Company* case to the terms of the NLRA alone. Instead the court said

> "There is nothing in the statute, *or in the principles governing judicial review of administrative action,* which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure . . ." (305 US at 375) (Emphasis supplied).

The courts of appeals have never considered the principles of the *Ford Motor Company* case as restricted to the NLRA. In *Fleming* v. *Federal Communications Commission,* 225 F.2d 523 (CADC 1955), the court applied the language of the *Ford Motor Company* case to a Federal Communications Commission appeal, stating that a reviewing court

> "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,— to secure a just result with a minimum of technical requirements." (225 F.2d at 526)

The court went on to say:

> "These principles are not limited to cases in which an agency has made inadequate findings. They extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result.'" (*id.*)

The power of the court to grant equitable relief in a Federal Power Commission case was recognized in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F.2d 921, 924 (CADC 1958), where, on a petition for review of a Federal Power Commission order (under the companion statute, the Natural Gas Act) the court said:

> "Parties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review. As it is principally the protection of the public interest with which we are here concerned, no artificial restrictions of the court's power to grant equitable relief in the furtherance of that interest can be acknowledged."

The courts have not hesitated to provide retroactive relief in order to avoid injustice resulting from an administrative error. In *Tennessee Valley Municipal Gas Association* v. *Federal Power Commission,* 470 F.2d 446 (CADC 1972), the court held that the Commission erred in refusing to re-open an order upon the application of a customer of the regulated natural gas pipe line. In fashioning its remedy for the Commission's action, the court ordered refunds so as to place the customers in the same position they would have occupied had the agency error not been made. It held that this remedy was necessary

> "If the policy of the Natural Gas Act is not arbitrarily to be defeated by uncorrected Commission error . . ." (470 F.2d at 452).

In a case directly in point, *Mississippi River Corp.* v. *Federal Power Commission,* 202 F.2d 899 (CA3, 1953), the court considered a Federal Power Commission order which unlawfully precluded the regulated pipe line from increasing its rates by rejecting the company's rate filing without a hearing. The court ruled that the rejection order was invalid. This placed the proceedings in precisely the same procedural status as the instant case: under the corresponding provision of the Natural Gas Act (Sec. 4, 15 USC Sec. 717c), in the absence of a valid suspension order issued within thirty days of the filing, the new rates automatically went into effect, not subject to refund. Nevertheless, the court refused to allow the pipe line to retroactively increase its rates from the proposed effective date thereof. In a set of circumstances identical to those of the instant case, the court pointed out that to increase the charges retroactively would force customers of the pipe line to pay added charges for gas already resold to the ultimate purchasers on the basis of the pipe line's lower rate. The court could find "nothing in the statute that sanctions such a course." Accordingly, the court fashioned a remedy, which placed the parties in the same situation as if the Commission had issued a standard suspension and refund order.

The Natural Gas Act cases above discussed are applicable here, because the review provisions of that Act are substantially identical to those of the Federal Power Act (Natural Gas Act, Sec. 19, 15 USC Sec. 717r; Federal Power Act, Sec. 313, 16 USC Sec. 825 1).

Arrow Transportation Company is not in point.

Petitioner's reliance on the case of *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963), is clearly misplaced. In that case, the district court had attempted to tack on a further suspension of a rate increase *after the end of the seven-month suspension* which was provided for by the Interstate Commerce Act and which had been ordered by the Interstate Commerce Commission. This Court simply held that the court could not extend the maximum statutory period of suspension. In the present case, the maximum statutory period of suspension is five months (Federal Power Act, Sec. 205 (e), 16 USC Sec. 824 d (e)). The total suspension allowed by the Court of Appeals was for a period of five months from the effective date of the new rate filing (i.e., from July 14, 1972 to December 13, 1972). This is precisely the relief which I&M asked the Commission to grant to it. There is no similarity whatsoever to the situation in *Arrow Transportation Company*.

CONCLUSION

The result reached by the Court of Appeals in the instant case is in accord with a direct line of cases extending back for many years. It carriers out the precise course of action contemplated by the Federal Power Act and normally pursued in administrative proceedings under that Act. The court's remedy was the only possible solution which could avoid a totally undeserved windfall to the company and a grossly inequitable disaster to the customers of the electric utility.

There is no error in the action of the Court of Appeals, and no reason for a grant of certiorari by this Court.

Wherefore the IMMDA respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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